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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: ALL DIRECT PURCHASER ACTIONS

Master File No. 3:14-cv-03264-JD

**DIRECT PURCHASER PLAINTIFFS'
AND INDIRECT PURCHASER
PLAINTIFFS' OPPOSITION TO UNITED
STATES' MOTION FOR DISCOVERY
STAY OF CIVIL DEPOSITIONS OR, IN
THE ALTERNATIVE, MOTION FOR
CONTINUANCE OF DISCOVERY
DEADLINES**

Date: January 25, 2018
Time: 10:00 a.m.
Courtroom: 11, 19th Floor

1 **I. INTRODUCTION**

2 On December 15, 2017, intervenor the United States Department of Justice Antitrust Division
 3 (“DOJ”) filed a motion seeking a stay of deposition discovery in the instant case.¹ Dkt. No. 1981. DOJ
 4 seeks the discovery stay to “prevent Nippon Chemi-Con from impermissibly using civil depositions to
 5 evade . . . restrictions on criminal discovery.” *Id.* at 5. Specifically, DOJ seeks the discovery stay
 6 because Defendant Nippon Chemi-Con Corporation (“NCC”) requested to take the substantive
 7 deposition of Satoshi Okubo. *Id.*; Dkt. No. 1969. On this basis, DOJ seeks to delay depositions of seven
 8 key witnesses “as well as any other later-noticed depositions of potential criminal trial witnesses. . . .”
 9 Dkt No. 1981 at 7. The stay DOJ seeks is indefinite, until a time “after the conclusion of the trial or
 10 other final proceedings in *United States v. Nippon Chemi-Con*, CR 17-540-JD (N.D. Cal.).”

11 DOJ has not shown a stay of the civil litigation is necessary or advisable. Plaintiffs have a
 12 strong interest in concluding discovery and preparing the case for trial and ultimate resolution on the
 13 merits. Consideration of each of the relevant factors counsels for the civil litigation to proceed without
 14 delay. Plaintiffs should be permitted to take the depositions of key witnesses in an orderly fashion, and
 15 they should not be prejudiced due to the disruption and inefficiency that a stay would cause.

16 Direct Purchase Plaintiffs and Indirect Purchaser Plaintiffs (together, “Plaintiffs”) request that
 17 DOJ’s motion for a discovery stay of civil depositions be denied. In the alternative, were the Court to
 18 grant DOJ’s motion, Plaintiffs request that the Court set a date certain for the stay to be lifted, subject to
 19 modification for good cause shown. In addition, to avoid additional prejudice, Plaintiffs request that the
 20 Court adjust the close of fact discovery, expert discovery, and other deadlines to preserve the features of
 21 the litigation schedule now in effect. In particular, Plaintiffs suggest that the civil deposition stay end
 22 on or before November 15, 2018, that the close of fact discovery be continued to January 14, 2019, and
 23 that the deadline for Plaintiffs’ initial merits expert reports be continued to February 14, 2019

24 **II. LEGAL STANDARD**

25 The general rule is that civil litigation should not be delayed until the conclusion of related
 26 criminal litigation. “The Constitution does not ordinarily require a stay of civil proceedings pending the

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 28 ¹ On December 19, 2017, DOJ amended its motion to include an additional individual, Tokuo Tatai, in
 its requested discovery stay. (Dkt No. 1984).

1 outcome of criminal proceedings.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir.
 2 1995) (citing *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989) and *Sec. &*
 3 *Exch. Comm’n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980) (en banc)). “[A] court may
 4 decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders
 5 and conditions ‘when the interests of justice seem[] to require such action.’” *Dresser*, 628 F.2d at 1375
 6 (quoting *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970)).

7 Parties seeking redress for their injuries are entitled to a prompt resolution of their claims, even
 8 where there are concurrent criminal proceedings. The DOJ “must act quickly if it suspects that the laws
 9 have been broken. Grand jury investigations take time, as do criminal prosecutions.” *Dresser*, 628 F.2d
 10 at 1377. “The [civil enforcement action] cannot always wait for [DOJ] to complete the criminal
 11 proceedings if it is to obtain the necessary prompt civil remedy.” *Id.* On other hand, those seeking a
 12 stay bear a heavy burden. *See Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)
 13 (following liberal discovery principles of the Federal Rules, those opposing discovery are required to
 14 carry a heavy burden of showing why discovery should be denied). Ordinarily, the Court “should not
 15 block parallel investigations . . . in the absence of ‘special circumstances’ in which the nature of the
 16 proceedings demonstrably prejudices substantial rights of the investigated party or of the government.”
 17 *Id.* (citing *Kordel*, 397 U.S. at 11-13); *see also KLA-Tencor Corp. v. Murphy*, 717 F. Supp. 2d 895, 902
 18 (N.D. Cal. 2010) (“Even where a criminal proceeding is underway, a stay is discretionary and granted
 19 only when it would serve the interests of justice.” (citing *Keating*, 45 F.3d at 324)).

20 In determining whether the party seeking a stay has overcome its heavy burden, courts consider
 21 the extent to which a defendant’s Fifth Amendment rights would be implicated, as well as: (1) the
 22 interests of the civil plaintiffs in the prompt resolution of their claims and any prejudice they would
 23 suffer from delay; (2) the burden civil litigation would impose on defendants; (3) judicial economy and
 24 the convenience to the court; (4) the interests of non-parties; and (5) the public interest. *Keating*, 45
 25 F.3d at 324 (citing *Molinaro*, 889 F.2d at 903). “The decision whether to stay civil proceedings in the
 26 face of a parallel criminal proceeding should be made ‘in light of the particular circumstances and
 27 competing interests involved in the case.’” *Id.* (quoting *Molinaro*, 889 F.2d at 902).

1 **III. KEATING FACTORS DO NOT FAVOR STAYING CIVIL DISCOVERY HERE**

2 It is well within the broad discretion of this Court to grant or deny a discovery stay, when the
 3 interests of justice seem to so require. *See Keating*, 45 F.3d at 324 (citing *Molinaro*, 889 F.2d at 902,
 4 *Dresser*, 628 F.2d at 1375). Here, the *Keating* factors here do not weigh in favor of staying civil
 5 discovery, and a stay of civil discovery in this case would not serve the interests of justice. *Id.* Rather,
 6 these factors weigh against a stay without a fixed date for lifting or termination, as DOJ seeks here. *Id.*

7 **A. No Fifth Amendment Implications**

8 Because NCC is not a natural person, the Fifth Amendment does not apply. The Supreme Court
 9 in *Hale v. Henkel*, 201 U.S. 43 (1906), “settled that a corporation has no Fifth Amendment privilege.”
 10 *Braswell v. United States*, 487 U.S. 99, 105 (1988).² Accordingly, neither allowing civil discovery to
 11 proceed as scheduled nor staying civil discovery as DOJ requests would raise Fifth Amendment
 12 concerns as to Defendant NCC. *Id*; *see also In Re Grand Jury Empaneled on May 9, 2014*, 786 F.3d
 13 255, 261 n. 1 (3d Cir. 2015) (“[W]e discern nothing in [recent] Supreme Court jurisprudence that
 14 suggests the Court has, in any way, signaled its readiness to depart from its longstanding precedent
 15 regarding corporate custodians’ inability to invoke the Fifth Amendment privilege against self-
 16 incrimination.”).

17 **B. The Remaining *Keating* Factors Favor Denying the Stay of Civil Discovery**

18 Each of the five remaining *Keating* factors supports a denial of the open-ended stay the DOJ
 19 seeks.

20 First, Plaintiffs have a significant interest in proceeding expeditiously with this litigation,
 21 including with deposition discovery. *See Keating*, 45 F.3d at 324. Discovery in this case has spanned
 22 multiple years and is ongoing. Fact discovery has progressed substantially, and Plaintiffs’ class
 23 certification motion already has been completely briefed and argued. *Cf. Evolutionary Intelligence,*
 24 *LLC v. LivingSocial, Inc.*, No. 13-CV-04205-WHO, 2014 WL 213179, at *2 (N.D. Cal. Jan. 17, 2014)
 25 (granting a discovery stay because that action was “at an early stage, a stay would simplify the issues in

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 28 ² Likewise, DOJ did not address any potential Fifth Amendment concern that may arise either from
 allowing civil discovery to proceed as scheduled or from staying civil discovery as the DOJ requested.
 Dkt. No. 1981.

1 question, and a stay would not unduly prejudice [the party opposing the stay]”). Moreover, as discussed
 2 below, forcing Plaintiffs to proceed with merits discovery and expert analyses without deposition
 3 testimony from a number of key witnesses would impede Plaintiffs’ ability to effectively build their
 4 case and could result in undue prejudice. *See Keating*, 45 F.3d at 324.

5 Second, DOJ has not shown a stay is necessary to avoid imposing an unfair burden on
 6 Defendant NCC. *See Keating*, 45 F.3d at 324. In its moving papers, DOJ does not address this issue. In
 7 fact, the Supreme Court has made clear that pursuing simultaneous related criminal and civil
 8 enforcement actions against the same defendants does not inherently impose any unfair burden on the
 9 defendants. *See Kordel*, 397 U.S. 1; *see also Keating*, 45 F.3d at 326 (“A defendant has no absolute
 10 right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment
 11 privilege. Not only is it permissible to conduct a civil proceeding at the same time as a related criminal
 12 proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even
 13 permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment
 14 in a civil proceeding.”) (citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976)).

15 Third, DOJ fails to show that staying civil deposition discovery promotes convenience to the
 16 Court or the efficient use of judicial resources. *See Keating*, 45 F.3d at 324. To the contrary, staying
 17 discovery as to witnesses key to both the civil and criminal cases necessarily prolongs the already
 18 protracted and complex proceedings before the Court.

19 Fourth, as to the interests of Plaintiffs and of persons not party to the civil litigation, DOJ argues
 20 that staying deposition discovery furthers such interests because “[a]ny criminal convictions obtained
 21 by the government will materially aid victims in their recovery of damages, and a stay will protect non-
 22 party trial witnesses from potential harassment and intimidation.” Dkt No. 1981 at 6. However, there is
 23 no evidence to suggest that deposing the key witnesses at issue would result in “harassment and
 24 intimidation.” *Id.* Moreover, in light of the victims’ anticipated recovery in this civil antitrust suit, DOJ
 25 has not sought restitution in any of the criminal proceedings concluded thus far. Further, DOJ has
 26 obtained convictions of seven corporation defendants – NEC Tokin, Hitachi, Rubycon, Holy Stone,
 27 Elna, Matsuo, and Nichicon – who are also named Defendants in this civil action; however, only two of
 28 the convicted Defendants, NEC Tokin and Hitachi, have reached a proposed or approved settlement

1 with Plaintiff victims. Dkt. Nos. 1455 & 1989. Moreover, other Defendants have reached settlements.
 2 Thus, criminal convictions are neither necessary nor sufficient for the plaintiffs in the civil action to
 3 obtain redress for their injuries. Plaintiffs' continued prosecution of this civil action is central to
 4 obtaining fair and efficient recovery from the remaining Defendants. This factor therefore weighs
 5 heavily in favor of allowing the deposition discovery to proceed without delay.

6 DOJ's request for staying deposition discovery boils down to the fifth and final *Keating* factor.
 7 *See* 45 F.3d at 324. DOJ argues that the interest of the public in the pending civil and criminal litigation
 8 controls and weighs in favor of a discovery stay because the stay would "prevent Nippon Chemi-Con
 9 from impermissibly using civil depositions to evade . . . restrictions on criminal discovery" by taking
 10 the deposition of Okubo or other potential criminal trial witnesses. Dkt No. 1981 at 5. However,
 11 preventing any party from deposing a number of key witnesses because one Defendant may seek to
 12 expand its discovery beyond its rights in a criminal proceeding would be inefficient and unnecessary.
 13 To the contrary, the Court should exercise its discretion to manage the litigation consistent with the
 14 interests of the Plaintiffs, the injured parties. *See id.* To the extent Defendant NCC attempts to take
 15 depositions that would improperly reveal to NCC testimony of DOJ trial witnesses, DOJ may move to
 16 quash NCC's deposition notices on that basis. *See id.* For example, if NCC notices a deposition of key
 17 witness Okubo, DOJ may seek to quash NCC's deposition notice. Also, to the extent another party
 18 takes deposition testimony of potential witnesses in the criminal proceeding, this Court has the
 19 discretion to impose a protective order limiting the use of such deposition testimony to this civil action.
 20 *See Dresser*, 628 F.2d at 1375 ("[A] court may decide in its discretion to stay civil proceedings,
 21 postpone civil discovery, or impose protective orders and conditions 'when the interests of justice
 22 seem[] to require such action.'") (quoting *Kordel*, 397 U.S. at 12 n.27); *see also United States v. Hines*,
 23 No. 11-CV-05080, 2012 U.S. Dist. LEXIS 149713, at *20-24 (E.D.N.Y. 2012) (holding that narrowly
 24 tailored protective order restricting use of deposition testimony to civil case is properly used to "further
 25 the goal of permitting as much testimony as possible to be presented in the civil litigation," "despite the
 26 potential burden it may place on the government's ability to bring parallel civil and criminal
 27 proceedings"). Moreover, the interest of the public in the pending civil litigation aligns with the interest
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1 of the Plaintiffs in proceeding fairly and expeditiously to trial in this litigation. *See Keating*, 45 F.3d at
 2 324.

3 Overall, the *Keating* factors do not weigh in favor of staying civil deposition discovery, and
 4 such a stay would not serve the interests of justice. Rather, the balance of the *Keating* factors in this
 5 case favor proceeding with civil discovery as scheduled. *See id.*

6 **IV. ALTERNATIVE RELIEF TO AVOID PREJUDICE TO CRIME VICTIM PLAINTIFFS**

7 If this Court is inclined to grant a stay of civil deposition discovery, Plaintiffs respectfully
 8 request that the Court fashion the stay to avoid prejudice to Plaintiffs as follows.

9 First, DOJ seeks an open-ended stay without a fixed date for its termination. DOJ's request that
 10 the deposition discovery stay continue until "after the conclusion of the trial or other final proceedings
 11 in *United States v. Nippon Chemi-Con*, CR 17-540-JD (N.D. Cal.)" is ambiguous and may include the
 12 pendency and duration of criminal appeals. Dkt No. 1981 at 7. Thus, Plaintiffs request that the Court
 13 order any civil deposition discovery stay to end by November 15, 2018, a date certain one month after
 14 the start of the criminal trial on October 15, 2018.³ Such a fixed date addresses DOJ's concerns while
 15 avoiding delays of unclear and unnecessary duration. And the DOJ would be free at any point to seek to
 16 extend the stay for good cause shown.

17 Second, if the Court grants a stay, Plaintiffs request that the Court also continue all remaining
 18 discovery deadlines—including expert report and discovery deadlines—during the delay of the
 19 depositions of the key witnesses.⁴ DOJ's criminal prosecution of NCC and this civil case are closely
 20 related. Thus, the named witnesses DOJ strategically intends to use as trial witnesses, as well as any
 21 additional deposition witnesses that DOJ may identify as a potential trial witness, are likely critical
 22 witnesses as to both the criminal and civil cases. Forcing Plaintiffs to complete merits discovery and to
 23 proceed with expert analyses without deposition testimony from several critical witnesses in this case
 24 would result in unfair and undue prejudice to Plaintiffs.

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 27 ³ DOJ has not provided any estimate as to the expected duration of the criminal trial of Defendant
 NCC. Thus, Plaintiffs propose to account for a reasonable trial duration of one month.

28 ⁴ Plaintiffs also have requested to extend certain deadlines as a result of the Court granting an extension
 on certain discovery motions. *See e.g.*, Dkt. No. 1988.

1 To avoid this prejudice, Plaintiffs respectfully request all remaining discovery and expert
2 deadlines be continued alongside any stay such that Plaintiffs substantively are in the same position as
3 they currently occupy without the stay. Accordingly, if the Court were to grant a stay, Plaintiffs request
4 that the close of fact discovery, currently scheduled for March 9, 2018, be continued to January 14,
5 2019, 60 days from the proposed end of the civil deposition stay. The 60-day period will allow
6 Plaintiffs to depose the seven key witnesses DOJ identified as subject to the stay as well as any
7 additional trial witnesses DOJ may identify or that Plaintiffs may learn about during these depositions.
8 Plaintiffs also request that the deadline for Plaintiffs' initial merits expert reports, currently scheduled
9 for April 9, 2018, be continued to February 14, 2019, 31 days after the proposed close of fact
10 discovery—maintaining the current interval of 31 days between the close of discovery and the deadline
11 for initial merits reports. Plaintiffs' experts will rely in their reports on the fruits of discovery—
12 including from any depositions subject to a stay—and so their reports should not be due until a
13 reasonable time after fact discovery is complete. While Plaintiffs prefer to proceed with this litigation
14 as expeditiously as possible, these delays in the close of discovery are necessary to prevent substantive
15 prejudice to Plaintiffs that otherwise could result if the Court were to grant DOJ's motion to stay civil
16 deposition discovery.

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CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that DOJ's motion for a discovery stay of civil depositions be denied. In the alternative, were the Court to grant DOJ's motion, Plaintiffs request that the civil deposition stay end by November 15, 2018, that the close of fact discovery be continued to January 14, 2019, and that the deadline for Plaintiffs' initial merits expert reports be continued to February 14, 2019.

Dated: December 29, 2017

Respectfully Submitted,

JOSEPH SAVERI LAW FIRM, INC.

By: /s/ Joseph R. Saveri
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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2017 I caused a copy of the foregoing

OPPOSITION TO UNITED STATES' MOTION FOR DISCOVERY STAY OF CIVIL DEPOSITIONS

to be filed electronically. Notice of this filing will be sent by operation of the Court's ECF electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

By: /s/ Joseph R. Saveri
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